No. 04-281

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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Promoting the deployment of broadband communications capabilities is a national policy goal of critical importance. Consistent with that objective, the Federal Communications Commission (FCC) concluded that cable modem service is most appropriately classified as an interstate "information service" under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, and, therefore, is not subject to the extensive regulatory requirements that Title II of the Act, 47 U.S.C. 201 *et seq.*, imposes on providers of telecommunications services. Because the FCC is the expert agency that Congress entrusted with implementing the Act, its decision should have been evaluated under the framework established in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The Ninth Circuit, however, concluded that its prior inconsistent reading of the Act, adopted

without the benefit of the FCC's subsequent interpretation, entirely foreclosed application of the *Chevron* framework. The Ninth Circuit thus overrode the statutory interpretation of the agency with responsibility for implementing the statute and put into place its own nationwide scheme for regulating cable modem service, without ever inquiring whether the agency's contrary interpretation was a reasonable one. Those circumstances—none of which the briefs in opposition contest—establish that further review is warranted.

1. Respondents opposing certiorari do not dispute that the question of the proper regulatory classification of cable modem service is "important." Earthlink Opp. 13; see States Opp. 3. They accept as well that the reasoning on which the Ninth Circuit's reversal of the FCC was based—the premise that, in light of the court of appeals' own past precedent, the FCC's considered views are entitled to no deference whatever—would not be binding on this Court. See Brand X Opp. 24.[1] Their primary argument, however, is that further review is not warranted because the Ninth Circuit's decision can be supported on the alternative basis that, if *Chevron* were applied, the statute would be found to

[1] Brand X does attempt to defend the Ninth Circuit's reasoning (at 23) on the ground that "once a court has interpreted the statute it is no longer ambiguous; its plain meaning has been ascertained by the court." If accepted, that assertion would override the principle that Congress intends "the ambiguities it chooses to produce in a statute" to "be resolved by the implementing agency." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). Courts of appeals may not read ambiguity out of a statute by "beat[ing] the [agency] to the punch," Pet. App. 24a (O'Scannlain, J., concurring), any more than they may employ other means to strip agencies of the interpretive powers that Congress has delegated to them.

support their position unambiguously. See *ibid.*; States Opp. 19; Earthlink Opp. 13.

Respondents are mistaken. In the first place, no court has ever examined the relevant statutory provisions and concluded that they are unambiguous, and it would be remarkable to enjoin a major FCC initiative based on a theory that no court has ever adopted. The States are simply wrong in contending (at 19) that the Ninth Circuit "concluded that the act is susceptible only to one reasonable interpretation." The Ninth Circuit did not do so either in this case or in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (2000). As the Ninth Circuit explained here, when it decided *City of Portland*, the FCC had not yet classified cable modem service, and the court therefore was "not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." Pet. App. 19a (quoting *City of Portland*, 216 F.3d at 876). For that reason, the court in *City of Portland* simply interpreted the statute as it thought best, without regard to whether there was ambiguity that the FCC had authority to resolve. See *ibid.* (court in *City of Portland* "never explicitly stated * * * that our interpretation of the Act was the only one possible" and it "never said the relevant provisions of the Act were ambiguous").

Given the importance of the regulatory classification of cable modem service under the Communications Act, this Court's review would be warranted even if the court of appeals had purported to apply *Chevron* in rejecting the FCC's position. This case, however, presents an even stronger need for review, because *no* court has examined the FCC's interpretation under *Chevron*. Instead, national communications policy has been set by the accident that the petitions for review in

this case were assigned by lottery to the Ninth Circuit.[2] Further review is warranted so that the FCC's expert judgment regarding the proper interpretation of the Communications Act can be evaluated under appropriate *Chevron* standards. Respondents' various arguments on the merits can be fully considered at that time.

2. In any event, respondents' assertions that the Act unambiguously forecloses the FCC's approach are mistaken. Although respondents in opposition insist (States Opp. 20; Earthlink Opp. 18; Brand X Opp. 27) that cable modem service consists of separate telecommunications services and information services, each of which is offered to the public, nothing in the Act compels that view. The mere fact that cable operators employ telecommunications to provide cable modem service is insufficient to support respondents' conclusion. For instance, cable operators use network software to offer their Internet access services, but that does not mean that cable operators *offer* network software to their customers. Nor is there merit to Earthlink's contention (at 23) that "it defies common sense and the ordinary meaning of the words involved to say

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[2] Brand X (at 23) and the States (at 28) incorrectly assert that no circuit split exists over the relationship between *Chevron* principles and circuit precedent. The Eleventh Circuit has described the Ninth Circuit's approach toward this issue as "illogical[]," and has correctly observed that the principle of stare decisis that this Court articulated in *Neal* v. *United States*, 516 U.S. 284 (1996), and on which the Ninth Circuit purported to rely (Pet. App. 20a), applies only where there has been a judicial construction of a statute that the court found to be unambiguous. *Satellite Broad. & Communications Ass'n of Am.* v. *Oman*, 17 F.3d 344, 348 (11th Cir.), cert. denied, 513 U.S. 823 (1994). See also Pet. 20-21 (discussing multi-circuit conflict).

that the cable company is not 'offering' the transmission to the customer." As the FCC explained, the cable company does not "offer" a transmission service, but rather an "Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." Pet. App. 94a. That conclusion is in keeping with "common sense," with the "ordinary meaning of the words involved," and with sound policy to encourage the rapid and widespread development of advanced communications capabilities, as determined by the FCC in accordance with Congress's intent. See Pet. 3-5.

Earthlink also is mistaken when it argues (at 23) that, because cable modem service allows subscribers to "determine[] what information is sent, and where," there must be a separate offering of telecommunications services to those subscribers. Virtually all ISPs—including information retrieval services such as Westlaw and LEXIS that operate their own stand-alone access terminals—enable subscribers to select the information that they want to access via telecommunications, but these ISPs are not telecommunications common carriers under the Communications Act. The subscriber's use of the information service capabilities provided by the ISP "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," 47 U.S.C. 153(20), does not compel the conclusion that the telecommunications component is a separate telecommunications service offered for a fee directly to the public. See 47 U.S.C. 153(46).

3. The opposing respondents' reliance on the FCC's "Computer Inquiries" proceedings is misguided as well. Beginning in 1966, those proceedings addressed "regulatory problems raised by the confluence of communi-

cations and data processing." *Amendment of Section 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 386, para. 2 (1980) (*Computer II Order*). One issue was "whether communications common carriers"—particularly historical monopoly telephone companies—"should be permitted to market data processing services, and if so, what safeguards should be imposed" to protect against anticompetitive or discriminatory practices. *Id.* at 389-390, para. 15. In the *Computer II Order*, the FCC distinguished the telephone company's "basic" services (which are "common carrier offering[s]" of "pure transmission capability," *id.* at 419-420, paras. 93, 96) from their "enhanced services" (which are computer processing services "offered over common carrier transmission facilities," *id.* at 498, App. § 64.702(a)). Under the *Computer II Order*, telephone common carriers, when they provide enhanced services, must acquire their own basic services under the same tariffed terms and conditions that the carrier offers to other enhanced service providers. *Id.* at 474-475, para. 231. That framework enables the FCC to limit Title II regulation to traditional telephone companies' common carrier offerings, while enabling their new enhanced services to remain free from Title II regulation. See *id.* at 428-435, paras. 114-132.

Although the statutory term "information service" and the former regulatory term "enhanced service" largely cover the same functions, they are not coextensive. Enhanced services are by definition offered over common carrier transmission facilities, whereas information services may be provided via *any* form of telecommunications. *In re Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R.

21,905, 21,956, para. 103 (1996). Because the FCC's Computer Inquiries did not address the question the Commission decided here—the regulatory treatment of Internet access services provided over *non*-common carrier cable facilities by entities that did *not* have the historical regulatory obligations of traditional telephone companies—respondents' reliance (see Earthlink Opp. 19; Brand X Opp. 4-5 & n.26) on decisions involving the *Computer II Order* regime is misplaced.[3]

Respondents in opposition also err in suggesting (States Opp. 26; Brand X Opp. 6-7; Earthlink Opp. 20) that the FCC's classification of cable modem service conflicts with its classification of digital subscriber line (DSL) service offered by traditional telephone companies. As explained in the petition (at 11, 27), consistent regulatory treatment of competing broadband services is one of the FCC's principal policy goals. In accordance with that goal, the FCC has tentatively concluded that the provision of Internet access over DSL, like cable modem service, should be classified as solely an information service under the Communications Act. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019, 3030, para. 20 (2002). Although the FCC has not finally resolved whether DSL service should be classified as an information service, the agency is not required to resolve all potentially related classification

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[3] Although the States contend (at 9, 24) that *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11,501 (1998), supports the Ninth Circuit's bifurcated classification of cable modem service, the FCC explained there that the relevant inquiry is whether "functionally, the consumer is receiving two separate and distinct services." *Id.* at 11,530, para. 60 (citation omitted).

issues in one decision. See 47 U.S.C. 154(j); *FCC* v. *Schreiber*, 381 U.S. 279, 289-294 (1965).

4. Respondents err in contending that the FCC's classification of cable modem service in some way circumvents the criteria for forbearing from regulating telecommunications and other services under Section 10 of the Communications Act, 47 U.S.C. 160. See States Opp. 18, 27; Brand X Opp. 30; Earthlink Opp. 29-30. Because Section 10 does not address the criteria for determining whether a service is a telecommunications service in the first place, it has no bearing on the validity of the FCC's determination that cable modem service does not fall into that category.

In any event, respondents do not disagree that, if the FCC were to classify cable modem service as a telecommunications service and attempt to ease the associated regulatory burdens through forbearance under Section 10, the forbearance proceedings would be hotly contested and would substantially delay the achievement of regulatory certainty for broadband service providers and customers. In those circumstances, it would be particularly strange if the existence of Section 10—which Congress enacted to promote the *relaxation* of Title II's regulatory strictures—were used to support the imposition of new Title II obligations on cable modem service.[4]

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[4] Respondents contend (States Opp. 26; Earthlink Opp. 29; Brand X Opp. 27) that the FCC's decision undermines Congress's supposed intent that the FCC regulate cable modem service under Title II of the Communications Act. As explained in the FCC's decision and in the petition, the Act embodies no such intent. See Pet. 16-19. Moreover, the FCC's policies do not constitute a disclaimer of federal regulatory authority over cable modem service. The Commission has jurisdiction over cable modem service and other information services under Title I of the Act, 47 U.S.C. 151 *et*

5. Likewise, and contrary to the States' argument (at 22, 25), there is no inconsistency between the FCC's classification of cable modem service and the language in Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153. Section 706 uses the phrase "State commission with regulatory jurisdiction over telecommunications services" to identify the specific state regulatory bodies (*i.e.*, the agencies that regulate telephone service) to which Congress directed a broad mandate to promote competition and investment in "advanced telecommunications capabilities." § 706, 110 Stat. 153. Nothing in Section 706 suggests that advanced telecommunications capabilities are necessarily telecommunications services subject to common carrier regulation.

6. Finally, contrary to the suggestions of Brand X (at 27) and Earthlink (at 10), the FCC's classification of cable modem service under the Communications Act does not conflict with the position taken by the Department of Justice (DOJ) in proceedings involving the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1001 *et seq.* CALEA imposes requirements on telecommunications carriers to facilitate law enforcement agencies' authorized electronic surveillance. In 2003, certain components of DOJ suggested that regulating cable modem providers as telecommunications carriers under Title II of the Communications Act would be one way of ensuring that cable modem service is covered under the more inclusive definition of "telecommunications carrier" that Con-

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seq. See Pet. App. 137a-141a. Indeed, the FCC has a rulemaking proceeding pending to consider what specific obligations, if any, should be imposed on cable operators providing Internet access services. See *id.* at 133a-168a.

gress used in CALEA. See 47 U.S.C. 1001(8); Earthlink Opp. App. 13a-14a. In August 2004, the FCC released a Notice of Proposed Rulemaking in which it tentatively concluded that, given CALEA's broader reach, cable modem providers are subject to CALEA's obligations even though they are not telecommunications carriers under Title II. *In re Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, 19 F.C.C.R. 15,676, 15,705, para. 50 (2004). The CALEA proceeding is ongoing, and the correct classification of cable modem service under CALEA will be addressed in that administrative context.

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For the forgoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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